OHIO ENVIRONMENTAL COUNCIL

24 August 2000

Ms. Cheryl Roberto
City of Columbus, Office of the Mayor
90 W. Broad Street
Columbus, OH 43215

RE: Clean Water Act revised facilities plan

Dear Ms. Roberto,

Thank you for the opportunity to discuss the revised wastewater facilities (201) plan and for showing representatives of the Ohio Environmental Council (OEC) the multimedia presentation describing additional plan guidelines. The policies Columbus is seeking to add to their guidelines for centralized wastewater collection and treatment are generally in agreement with how OEC has looked at domestic wastewater issues in the past. The OEC supports Columbus in their efforts to update the Clean Water Act 201 planning document and supports policy changes as outlined in the following. As you may know the OEC has taken a position in specific situations against domestic wastewater spray-field systems. We have been involved in discussions with OEPA representatives on this very issue recommending to them a need to strengthen rules to control these proliferating systems. Our position can be briefly outlined as follows: 1) When feasible waste discharges should be collected and treated in accordance with a regional (208) sewer district. Centralized systems offer technological advantage for wastewater best management practices to reduce nutrient impacts and control pathogens. 2) Spray-field application on subsurface drained lands should be considered by OEPA as discharge producing (drain tile outfall) and must be regulated through the OEPA anti-degradation program including a robust public participation process. In lieu of such a program spray-fields proposed over subsurface drainage should not be permitted. 3) Only in the most extreme circumstances should 'zero discharge' systems be given consideration and only after considerable scrutiny including public comment. The OEC cannot predict what 'extreme circumstances' might mean. The sensitive nature of the Big Darby watershed may be one example. Various jurisdictions should come together and carefully consider the best way to protect this national treasure from the negative impacts of unplanned for growth.

The proliferation of spray-field systems primarily in western states seems to pertain to issues of water cycle reuse in water poor regions. Tertiary treated wastes may have benefit in some cropping systems as irrigation make-up water. In Ohio where water excess is the norm reuse seems to be a less important reason for requesting a permit and perhaps anti-degradation process avoidance may be a more significant primary reason. As watershed planning plays a greater role in correcting stream segment impairments, total maximum daily loading requirements of the Clean Water Act can help to 'connect the dots' between nonpoint source and point source stream impacts. A centralized wastewater collection policy is a proactive measure in protecting waterways. We applaud and encourage the City of Columbus to continue a forward seeking stakeholder approach in responsibly managing human impacts on our water resources.

Sincerely,

Dan Binder
President, OEC Board of Directors

Vicki Deisner
Executive Director, Ohio Environmental Council

1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449 (614) 487-7506 Fax: (614) 487-7510 www.theoec.org

OHIO DEPARTMENT OF DEVELOPMENT

Bob Taft
Governor

C. Lee Johnson
Director

Post-it® Fax Note 7671	Date 11/6	# of pages ▶ 1
To Cheryl Roberto	From John Doutt	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 7608	Fax # 8019	

November 1, 2000

Mr. John Doutt, P.E., Director
Department of Public Utilities
910 Dublin Road
Columbus, OH 43215

Dear Mr. Doutt:

The City of Columbus is engaged in an important and timely task of upgrading its wastewater plan for its service area. The Ohio Department of Development (ODOD) believes the city is best suited to handle discussions regarding the plan with applicable state agencies including the Ohio Environmental Protection Agency (OEPA). ODOD recognizes the plan may cause some disagreement among local stakeholders and suggests that negotiations should occur between stakeholders without state involvement.

I want to thank you and Cheryl for meeting with the Department. If you have any questions, please feel to contact me at (614) 466-4484.

Sincerely,

John M. Magill
Assistant Deputy Director
Office of Urban Development

cc: James Manuel, Director
Jean Carter Ryan, Deputy Director
Cheryl Roberto, Policy Advisor

VILLAGE OF PLAIN CITY
OFFICE OF THE ADMINISTRATOR
213 S. CHILLICOTHE ST.
PLAIN CITY, OHIO 43064

September 11, 2000

To: Cheryl Roberto
City of Columbus
Office of Mayor Coleman

Re: Proposed Facilities Plan

Ms. Roberto,

I would like to thank Mayor Coleman, you, Mr. Doubt and the City of Columbus for allowing time to share your facilities plan with the Village of Plain City to include various Township and County officials. The meeting, in my opinion, was very informative, worthwhile and I believe that all are much more enlightened in the Facilities Planning and Regional Planning Process.

It is the wishes of the Village of Plain City that the City of Columbus withdraw the proposed boundary back to within Franklin County. It was the wishes of both Union and Madison Counties that we would like to plan from within our boundaries as well, which will include Plain City within both counties 208 planning areas.

Again we would like to thank the City of Columbus for sharing with the Village your months of hard work and planning and hope that we can work together sometime in the future on other issues, and we will no doubt be seeing you again when our plans are drawn within the Village, but at this time we believe it is not in our best interest or the Counties best interests that the Darby watershed be protected by the City of Columbus.

Thanks again,

Gene Dougherty
Administrator

BROWN TOWNSHIP

Trustees
Mr. Ronald Williams
Mrs. Pamela Sayre
Mr. Gary Dever

September 6, 2000

Clerk
Mrs. Rosemary Smith
7710 Morris Road
Hilliard, Ohio 43026
(614) 876-5496
(614) 876-2421 FAX

Comments
c/o Policy Unit
Office of the Mayor
City of Columbus
90 West Broad Street
Columbus, Ohio 43215

Re. Columbus Metropolitan Facilities Plan Update
Comments of Brown Township Board of Trustees

To Whom It May Concern:

First of all, we appreciated the opportunity to comment on the Columbus Metropolitan Facilities Plan Update at the meeting held on August 24, 2000. The purpose of this letter is to submit further comments in writing regarding this proposed Plan.

As explained by Columbus representatives at the August 24th meeting, the Columbus Metropolitan Facilities Plan Update (the "Plan") proposes a geographic area that would be controlled and administered by the City of Columbus through the year 2020 as the method to address wastewater management within a proposed facilities plan area. Under Columbus' proposed Plan, and with the exception of certain areas not affecting Brown Township, the Plan proposes that Columbus' centralized sewerage system be designated as the exclusive sanitary sewer method for the facilities planning area. Also, the proposed Plan would preclude the use of "alternative wastewater systems" (meaning those systems which treat and/or dispose effluent through spray irrigation or constructed wetlands) within the planning area.

The Brown Township Board of Trustees objects to Columbus', proposed Plan for the following reasons:

1. Columbus' proposed Plan states that alternative wastewater systems ". . . result in detrimental fiscal impacts to local government, and deprive local government of control over community growth patterns". Columbus' justification for precluding alternative wastewater systems is simply unsupported by the facts. There are numerous instances of alternative systems which have positive fiscal impacts to local governments and allow for greater local government control over growth patterns. The City of Columbus' use of its central wastewater treatment system has permitted densities far in excess of those developments utilizing alternative wastewater systems, especially those systems utilizing spray irrigation technology. Moreover, the City's proposed Plan incorporates numerous unincorporated areas which are not currently

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under the City's jurisdiction. Given the City's historic growth patterns, the use of centralized sewer within these areas will result in much greater densities than those currently allowed under existing comprehensive plans which are in place for these various jurisdictions.

2. Several of the City's stated policies and goals which purportedly underlie its proposed Plan include protecting water resources, mitigating stormwater impacts from development and curbing urban sprawl. It is difficult, if not impossible, to reconcile these stated policies and goals with the City's historic growth patterns which are facilitated by its central wastewater treatment system. The axiom that "development follows the pipe" is validated by simply reviewing the growth patterns of the City of Columbus over the past 40 years. The Columbus Comprehensive Plan recommends that the City pursue annexation of unincorporated land which is surrounded by City land, commonly known as in-fill areas. The Columbus Comprehensive Plan goes on to state, as a recommendation, that annexation requests should be based on the serviceability of the area and that urban density territorial expansions in areas having significant environmental attributes should be discouraged. Unfortunately, when these policies are compared to actual City practices, it is clear that the growth and development of the City of Columbus continues to follow the pipe. For instance, within the past two years, the City of Columbus was presented with an annexation of territory which, by definition, consisted of an "in-fill" area. More particularly, the territory proposed to be annexed consisted of an existing apartment facility known as Darby Woods which was virtually surrounded by City territory. Despite the recommendations contained in the comprehensive plan, the City refused to accept this area, purportedly on the basis that it lacked sufficient fire and police personnel to adequately service the territory. Yet, within a matter of months, the City of Columbus went on to accept a 200 acre annexation of agricultural land located several miles west of the Darby Woods complex which will eventually be developed for single family housing. This is simply but one example of the stated policies of the City not conforming to its usual practices in terms of land use, growth and development. We believe that the proposed Plan would further encourage and continue these unfettered growth practices on the part of the City.

3. Although the Brown Township Board of Trustees was permitted the opportunity to comment on the proposed Plan, the City's Plan fails to take into account the Comprehensive Land Use Plan adopted by Brown Township in 1992 and updated in 1998. The Brown Township Comprehensive Plan represents an adopted policy statement which is based upon a rural, low density environment which contains protections for significant environmental features such as the Big Darby Creek. The land use recommendations contained within the Brown Township Comprehensive Plan include: a Flood Plain River Protection District which establishes a "no build and no cut" zone within and along the Big Darby Creek; the creation of the "Darby Creek Corridor Overlay District" which encompasses the entire area along the Big Darby Creek and limits land use within this district to agriculture, open space and single family residential uses having a minimum lot size of five acres; with the remaining area of Brown Township being designated as a "low density residential district" at a density of one unit per 2.5 acres. Columbus' proposed Plan not only fails to take into account the land use recommendations of the Brown Township Comprehensive Plan, Columbus' proposed Plan fails to mention any adopted plan of any other jurisdiction. Interestingly enough, during the comment meeting of August 24th, Columbus representatives stated that although a large portion of Madison County was included

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within the facilities plan update, since the Madison County Land Use Plan proposed that the area would not be developed at densities greater than two persons per acre, Columbus afforded Madison County the opportunity to opt out of its facilities plan update. Brown Township's Comprehensive Plan clearly mandates densities less than two persons per acre. Yet, Brown Township was not afforded the same option and courtesy as that given to Madison County.

4. Finally, the Brown Township Board of Trustees firmly believes that the underlying and unstated purpose of Columbus' proposed Plan is to ensure the eventual elimination of Townships within Franklin County through annexation to either the City of Columbus or to one of the suburban municipalities wherein Columbus is the sole provider of wastewater treatment service. As you probably know, in order to obtain access to Columbus water and/or sewer service, a property owner is required to annex to either the City of Columbus or one of its municipal contract partners. During the comment meeting of August 24th, the Columbus representatives refused to acknowledge this underlying purpose, despite clear evidence to the contrary. The City has, and will continue to use, its water and sewer services to force annexation of township areas. Once these annexations take place, the City ignores established township land use policies and development continues as usual. At the August 24th meeting, the City attempted to downplay these issues by explaining that it has protected the western areas of Franklin County by creating an environmental conservation district. Yet, in 1997, the Mayor and his administration recommended development within this district. Also, the City has attempted to disparage alternative wastewater systems on numerous grounds, including a statement that these systems create urban sprawl. First of all, the Franklin County Commissioners have taken the proactive step of enacting procedures and guidelines for the use of these systems. We support the Commissioners' efforts in attempting to ensure that alternative wastewater systems will be properly operated and maintained. Secondly, if the City is truly concerned about urban sprawl, perhaps the best way to curb sprawl is not to increase its service area. In fact, alternative wastewater systems that are currently in use in Delaware County are encompassed within developments having densities far lower than those allowed in the City of Columbus. Lastly, various City representatives have espoused principles of looking inward and revitalizing the inner city. Yet, these same representatives have approved developments which involve the raising of flood plains and the development of prime agricultural land in order to accommodate high-density land uses.

In summary, we believe that Columbus' proposed Plan is not responsive to the needs and goals of Brown Township. Although the City would have one believe that its proposed plan is a growth management tool, the facts reveal that it will simply act as a growth enhancement tool by continuing the City policies of unfettered growth within what are now planned as rural, low density areas. This Plan would undermine and eventually destroy the land use recommendations contained within the Brown Township Comprehensive Land Use Plan. We would suggest that the City focus its efforts on revitalization of current municipal areas while, at the same time, engaging in meaningful discussions on a regional comprehensive land use plan which recognizes that there are areas within Franklin County which are not suitable for the extension of central wastewater treatment facilities. Furthermore, these discussions should include a review of areas where it may be appropriate to utilize alternative wastewater systems and/or the limited extension of centralized sewer without the need for annexation.

BROWN TOWNSHIP

Trustees
Mr. Ronald Williams
Mrs. Pamela Sayre
Mr. Gary Dever

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For these reasons, we firmly believe that Columbus' proposed Plan fails to take into account or address the needs of Brown Township and surrounding communities of unincorporated areas in a manner which is responsive to the desires of the elected officials and residents of these areas.

Sincerely,

THE BOARD OF TRUSTEES
OF BROWN TOWNSHIP

Gary Dever, Trustee

Ron Williams, Trustee

Pam Sayre, Trustee

cc: The Ohio Environmental Protection Agency
Attn: Christopher Jones, Director
Lazarus Government Center
P. O. Box 1049
Columbus, Ohio 43216-1049

Franklin County Commissioners
Attn: The Honorable Arlene Shoemaker
373 South High Street, 26th Floor
Columbus, Ohio 43215

Plain Township Board of Trustees

ESTABLISHED 1810 • BOX 273 • NEW ALBANY, OHIO 43054 • 855-7770 • Fax 855-7761

September 8, 2000

Comments
C/0 Policy Unit
Office of the Mayor
City of Columbus
90 West Broad Street
Columbus, Ohio 43215

To whom it may concern:

Re: Columbus Metropolitan Facilities Plan

I wish to thank you for the opportunity to comment on the Columbus Metropolitan Facilities Plan (CMFP) at the public information meeting held August 24, 2000.

It is obvious Columbus thinks a centralized system in most cases would be better. But to say it is the only one that should be considered in this mass area is not true. During the meeting, Mr. Doutt constantly degraded Franklin County's ability to regulate spray irrigation or wetlands application. He was using 25-year-old sewage systems as an example. Without knowing the area in consideration and supplying data that would support these accusations, one might question the real issue in this matter:

- If the City of Columbus is concerned about the environment, what is their plan?
- It has been said that some of the new projects downtown are mixing sewage with storm water and dumping in the Scioto River. If this is true, is Columbus concerned about the environment?
- The City of Columbus will run new facilities to new developments, but won't allow residents to hook into them when running past their property if they will not annex. That permits the extension of central sewer and water without annexation in negotiated areas, and recognizes the value of alternative wastewater treatment facilities, especially when these facilities will be owned operated and maintained by Franklin County. If Columbus were concerned about the environment, why pass an old system that is willing to pay the fee?

- What is Columbus' plan for the environment issue in the city at present? Wouldn't you think if they were concerned about the environment, they would have a plan with a budget to start cleaning up some of these areas?
- What about areas in the city that have been annexed for years and do not have facilities?
- Plain Township along with other townships in Franklin County has adopted comprehensive land use plans. Columbus' annexation policy which depends upon its control of water and sewer continue to annex township areas and permit land uses that are at odds with township land use plans.

The list could go on forever! The meetings we attended with other townships where these issues were discussed were all very positive about CMFP, with the exception that all townships around Franklin County would be giving up our sovereignty, which we are not willing to do. This forces us to look at other options.

The Mayor of Columbus told one of our trustees that Columbus uses water and sewer to control growth.

Plain Township strongly thinks this would be a great opportunity for Columbus to sit down with all entities in the CMFP areas and discuss a joint comprehensive plan that would allow good common sense growth for all. None of the townships we have talked to wants to stop Columbus from growing. We are part of Columbus, but Columbus has agreements with adjoining areas that, in fact, keep us from getting clean drinking water for residents that need it. Something about that is not O.K.

We hope the Environmental Protection Agency can see through this CMFP plan and consider Columbus' past history. This CMFP is nothing more than an attempt to strengthening its monopoly and annexing more township areas by withholding water and sewer services to residents who are within the facilities' planning area, but outside the City of Columbus.

Sincerely,

J. B. Bowe, Administrator
Janis K. Bobb, Trustee
Donald A. Cameron, Trustee
Donald R. Shoemaker, Trustee

Board of Trustees

of

Pleasant Township

CHAIRPERSON	VICE CHAIRPERSON	TRUSTEE	CLERK / TREASURER
Keith Goldhardt	Walter W. Krebs	Mary E. Evans	Paula J. Wilkins
877-3057	878-5552	877-3127	877-3511

September 8, 2000

Mr. John R. Doutt, P.E.
Public utilities Director
City of Columbus
910 Dublin Road
Columbus, Ohio 43215

Dear Mr. Doutt:

Thank you for conducting the informational meeting on August 24, 2000 and for the opportunity to submit our comments. We will relate our thoughts from the perspective of Pleasant Township and specifically the Darbydale area. We were pleased to hear Cheryl Roberto's statements at the meeting that the City of Columbus recognized that Darbydale is a special case.

Background

The Board of Pleasant Township Trustees is committed to infrastructure improvements in the Darbydale area, an older, well established community located on the banks of the Big Darby Creek. Earlier this year we retained the services of a consulting engineer to develop conceptual plans for water, wastewater and stormdrain improvements. The plan recommended that wastewater management be the first priority and the Board has embraced this advice. A secondary study is now underway to refine our approach.

The largest expense will be the construction of a sanitary sewer collection system to eliminate failing individual home systems but the most problematic issue will be wastewater treatment and the discharge point.

Three (3) treatment/discharge point alternatives are under consideration:

A. Land application of treated effluent
B. Direct discharge to Darby Creek
C. Pump to existing area WWTP

Specifics

The City of Columbus' strong stance against land application directly contradicts one of our alternatives. It has been the Board's experience that opposition will materialize to any proposal with varying degrees of intensity. As you know, this is the nature of public work. For example; a direct discharge proposal to the Big Darby may generate preset negative responses from some corners despite the fact that water quality will clearly improve. Additionally, typical pumping plans invariably impact some property owners more than others and could spawn a NIMBY (not-in-my-backyard) reaction when selecting pipe alignment options.

Position

At this point, we are persuaded to have our consultant identify the costs associated with these alternatives and then make a pragmatic decision on what is best for our constituents. While we would welcome a partnership and support from the City of Columbus, we hope you appreciate that we must keep all options open. Land application in fact may be dropped from consideration if it is not the best fit, all things considered. It is not within the best interest however to abandon a potentially viable alternative at this time because of your Facilities Plan Update.

As to your Facilities Plan Update to encompass the remainder of Franklin County and parts of bordering counties; I am speaking as a Trustee of Pleasant Township and as President of the Franklin County Trustees and Clerk's Association. We cannot support your planned expansion. Your track record tells us that you should first take care of your present Facilities Plan Area before you attempt to expand the plans.

I personally feel this update is nothing more than a move against Senate Bill 289 and allowing the City to annex at will. I am asking the Ohio EPA to recommend against the expansion.

If you have any questions or comments please do not hesitate to contact the me.

Sincerely,

Keith Goldhardt, Chairperson
Pleasant Township Trustees

PJW/

cc: Floyd Browne Associates, Inc.

PRAIRIE TOWNSHIP BOARD OF TRUSTEES
23 MAPLE DRIVE
COLUMBUS, OHIO 43228

September 8, 2000

Ms. Cheryl Roberto
c/o Policy Unit
Office of the Mayor
City of Columbus
90 West Broad Street
Columbus, Ohio 43215

Re: Columbus Metropolitan Facilities Plan Update
Comments of Prairie Township Board of Trustees

Dear Ms. Roberto:

The Prairie Township Board of Trustees (the "Board") attended the meeting held on August 24, 2000 and verbally commented on the Columbus Metropolitan Facilities Plan Update (the "CMFP"). The purpose of this letter is to provide our written comments regarding the CMFP (Attachment 1).

As we understand, the CMFP encompasses a geographic area (which includes Prairie Township in its entirety) and proposes to use, for the most part, Columbus' centralized sewerage system as the sole method of treating wastewater within the facilities planning area, all of which is being done under the guise of ". . .protecting our water while meeting the demands of regional growth". The CMFP would preclude the use of any alternative wastewater treatment systems within the planning area for the next 20 years. Consequently, no systems using spray irrigation or constructed wetlands to treat or dispose of effluent would be permitted.

We believe the CMFP is materially flawed, both in terms of methodology and practice, and recommend that it be rejected. Our reasons for this recommendation and areas of individual concern are as follows:

A. **Participation in Plan Formation.**

As described on page one of the draft for the CMFP, Columbus is seeking OEPA approval and incorporation of their plan into the 208 Areawide Waste Treatment Management Plan for the Central Ohio Region. As the Columbus authors point out in their methodology paragraph, only City departments and the engineering firm of Malcolm-Pimie, under City contract, were participants in the formation of this plan. Since the CMFP is purportedly designed to be an area plan for the "Central Ohio Region", local elected officials (and their engineering consultants – in the case of Prairie Township – Bischoff & Associates) should have been allowed to participate in this update prior to its publication. Instead, the CMFP was presented to us as a fait accompli. By refusing to allow our participation in the formation of the CMFP, this is simply a plan of, by, and for the sole and exclusive benefit of the City of Columbus. Coordination after the fact is useless.

B. **Inability To Review Current Plan.**

Despite several attempts to acquire a copy of the current plan, the original plan, or the addendum to the original plan, various representatives of the City of Columbus stone-walled or simply refused access to this material. Consequently, any knowledgeable or competent review or comment of the CMFP is virtually impossible.

If Columbus officials were truly interested in the environmental and practical improvements this plan is supposedly intended to produce, they should be excited over the opportunity to share any and all details of the plan.

Unfortunately, the City's agenda is more about annexation than the environment. Their "discussion and coordination" of this plan was nothing more than administratively "filling a square" to meet the public comment phase of the review process.

C. **Expansion vs. Maintenance and System Upgrades.**

The CMFP calls for Columbus to expand their sanitary system into new and greatly expanded areas. The intent of the enabling legislation to create Designated Management Agencies was to improve the environment by creating sanitary systems and networks which remove or limit the danger to the environment posed by unregulated, poorly maintained or neglected systems. Unfortunately, these words accurately describe Columbus' sanitary sewer system.

Briefly, Columbus still uses numerous combination storm/sanitary sewers in many of the older sections of the City. All to frequently, the older buildings connected to such a sewer has a use change from residential to commercial and a corresponding increase in the amount of effluents which are untreated and flow into our watercourses.

Even in the areas where the City had installed dedicated sanitary sewers, problems of poor maintenance and neglected enforcement creates more serous problems. Consider the case of *Livingston Court Apartments v. City of Columbus* (1998), 130 Ohio App.3d at 730 (Attachment 2). In this case, it was alleged that the City of Columbus had allowed the sanitary sewer system under its control to deteriorate and malfunction. The Court of Appeals agreed with this allegation and determined that the inaction on the part of the City of Columbus constituted a "taking".

Against this backdrop, to allow Columbus to expand their current sanitary sewer system invites additional environmental damage.

D. **Alternative Wastewater Systems.**

The CMFP proposes that no alternative wastewater systems are to be installed or operated within the facilities planning area. Columbus' stated justification for this proposal, as found in its CMFP, is that these systems". . . threaten drinking water, give rise to adverse environmental impacts (particularly in the Darby Watershed), result in detrimental fiscal impacts

to local government, and deprive local government of control over community growth patterns." Simply stated, this justification is completely untrue and unfounded. In fact, there are numerous examples of Columbus' central wastewater treatment facilities which have resulted in the very impacts which Columbus attempts to attribute to alternative wastewater systems. For instance, Columbus has attempted to portray itself as the protector of the Big Darby Ecosystem by its enactment of the Environmental Conservation District as part of its comprehensive plan. However, in the late 1990's, the Mayors of Columbus and Hilliard, along with their administrative assistants, recommended development within this environmentally sensitive area. Furthermore, the City of Columbus has recently amended its environmental conservation district in order to allow a high-density development to be built in the Spindler Road area. This development will result in the elimination of vegetation in an area the City had previously set aside for environmental reasons and will permit the discharge of stormwater drainage into ditches which are unable to handle the current stormwater runoff. The City's dismal record on environmentally sensitive development is not limited to the Darby Creek area. For instance, the City supported plans to build immediately next to the Pickerington Ponds Metro Park and Wildlife Refuge. Also, the City permitted the development of an area know as Grasshopper Creek in the Darby Watershed. Interestingly enough, this development was permitted without requiring hookups to the City's central sanitary sewer system. Rather, the City permitted the development of this property using individual sewage disposal systems.

Although the CMFP proposes the creation of an Environmentally Sensitive Development Area (the "ESDA"), the City's past actions reveal that this District will remain subject to the political whims of City office holders. It is interesting to note that the City acknowledges that it will provide centralized sewer service to areas located within the ESDA. Although the City attempts to qualify this statement by stating that no service will be provided until certain conditions are met, it is the City who will determine when such conditions are fulfilled. This is truly letting the fox into the chicken house.

E. The CMFP Ignores Land Use Plans Adopted By Other Jurisdictions.

The CMFP fails to take into account the various land use plans adopted by the townships located both in western Franklin County and throughout the facilities planning area. For instance, the townships in western Franklin County (including Prairie Township) have land use plans which recommend that most of the area remain zoned as either agriculture, open space or low density residential. Neither the City's historic zoning practices or its comprehensive plans has made any attempt to promote, protect or preserve agricultural uses or rural development. The growth pattern of the City for the past 40 years has clearly been development driven as opposed to plan driven. We take exception to the City's unsupported statement that alternative wastewater systems will somehow result in detrimental fiscal impacts to local government or further urban sprawl. In fact, Prairie Township applauds the actions of the Franklin County Commissioners who have taken the proactive step of enacting procedures and guidelines for the use of these systems. For the City to state that these systems will somehow " . . . deprive local government of control over community growth patterns" is simply another way of stating the City's belief that it will make better land use decisions than the townships. This is simply untrue, especially when compared to the City's growth practices over the past 40 years.

F. Need for a Multijurisdictional Sanitary and Stormwater Program

In order for the City of Columbus to adequately mitigate stormwater from development in areas of predominantly hydric soils, Columbus needs to comprehensively address these areas in conjunction with all jurisdictions in its proposed designated management area.

Examples of Columbus' failures in this area include:

1. Creative Child Day Care located at 5765 West Broad Street, annexed to Columbus in 1993 in order to acquire City water and sewer. They received their initial City water tap in 1998. To date, they are still awaiting sanitary sewer service and continue to use Township and State ditches for stormwater.

2. In late 1998, Columbus indicated to the development community that it was prepared to extend the Big Run Sanitary Sewer trunk further westward. This resulted in a flurry of annexation to the City and proposed development in otherwise agricultural areas located in Prairie Township. Such development includes a 226 unit apartment complex by Pedcor Investments. Development of this land on Alton Darby Road will mean the loss of over one million square feet of 100 year flood polygon for the upper areas of the Hellbranch Watershed (Attachment 3). Similar losses have recently occurred south of West Broad Street (State Route 40). This 200 acre tract of farm ground located at 6145 West Broad Street has been annexed to Columbus for purposes of building a highly dense single-family development. The development of this property will mean significant loss of both floodway and 100 year flood plain (Attachment 4). Nearly half of the annexed property on Galloway Road (Attachment 5) is in the 100 year or 500 year flood plain of the Hellbranch Watershed, which is a tributary to Big Darby Creek.

3. The proposed City development between Old Hall Road and New Hall Road demonstrates how creative City planners are willing to be in handling stormwater from Columbus subdivisions. The City simply intends to allow the developer to direct their stormwater through and existing Township development whose system (designed and constructed in 1974) was not created to handle this additional stress (Attachment 6).

The result of the City of Columbus' refusal to engage in a joint planning process with Prairie Township in which sanitary and stormwater facilities are part of the negotiation has led and is continuing to lead to the potential for major, City-instigated damage to the Hellbranch Watershed, loss of property due to increased flooding in Township areas and ultimately damage to the Big Darby Creek. Consequently, the ideal of protecting the environment suggested in the CMFP is not borne out in actual City practice.

In summary, we believe that Columbus must include other jurisdictions in the planning process by engaging in a meaningful dialogue among equals. Columbus needs to clearly demonstrate its appreciation of the seriousness of their obligation by repairing current problems within its existing system. The CMFP, as proposed, is not responsive to the needs and goals of

Prairie Township. Rather, we suggest that the City engage in a regional approach that does not simply view an area-wide waste treatment management plan as an opportunity to continue Columbus' 40 year old annexation policies. Prairie Township has demonstrated it commitment to the environment in numerous ways. For instance, the Township employs a private engineering consultant to review proposed stormwater drainage plans of developers within Township areas. Secondly, the Township administers its own zoning plan as has created an environmentally sensitive "Big Darby Creek Critical Resource Protection District" for areas along Big Darby Creek. Although the Township has objected, and, in some cases, litigated, annexations of farm land and flood plain into Columbus, Columbus has been able to successfully use it central wastewater treatment system to prevail in these annexation proceedings, thereby resulting in a continued westward flow of urban sprawl and habitat destruction. The adoption of this plan would, at the very least, constitute and endorsement of these search and destroy techniques used by Columbus over the past 40 years. We truly believe that the approval of the CMFP will result in the very evils it ostensibly is designed to eliminate.

The Board appreciates the opportunity to comment on the CMFP. However, for the reason stated above and those provided at the comment meeting, we request that it be disapproved.

Very truly yours,

THE BOARD OF TRUSTEES OF PRAIRIE TOWNSHIP

By _____
John W. Hart, Chairman

cc: The Ohio Environmental Protection Agency
Attn: Christopher Jones, Director
Lazarus Government Center
P.O. Box 1049
Columbus, Ohio 43216-1049

Franklin County Commissioners
Attn: The Honorable Arlene Shoemaker
373 South High Street, 26th Floor
Columbus, Ohio 43215

Mr. Keith Goldhardt
President, Franklin County Township Association
5373 Norton Road
Grove City, Ohio 43123

DRAFT ONLY -- FOR STAKEHOLDER CONSULTATION AND COMMENT

Columbus Metropolitan Facilities Plan Update

INTRODUCTION

The City of Columbus is submitting this updated Facilities Plan to address regional wastewater management needs through 2020. The overarching goal of this document is to provide a blueprint for protecting our water while meeting the demands of regional growth. The initial Columbus Metropolitan Facilities Plan for wastewater management was submitted by Columbus in 1976 and updated in 1984. Columbus requests that Ohio EPA approve this plan and incorporate it into the 208 Areawide Waste Treatment Management Plan for the Central Ohio Region.

METHODOLOGY

The City of Columbus conducted a series of cross-departmental work sessions over a period of eight months. The City work group included representatives from the Department of Public Utilities in both storm water management and sanitary sewer planning and construction, the Department of Trade and Development, the Health Department, the City Attorney's Office, and Malcolm-Pirnie, the City's overall engineering coordination consultant.

The City work group factored the following policies and goals into its planning decisions and ultimately this update:

- Protecting our water – drinking water and other critical water resources, particularly in the Darby Watershed;
- Maximizing existing infrastructure investments;
- Incorporating watershed planning;
- Mitigating stormwater impacts from development, particularly in areas of predominately hydric soils; and
- Curbing urban sprawl.

This plan is designed to address wastewater management needs through the year 2020. To accomplish this, the City work group determined which areas within the boundary are projected to have population densities of greater than 2 persons per acre by 2020. The work group used the following tools to make that assessment: 20 year population projections produced by the Mid Ohio Regional Planning Commission in conjunction with Department of Development planning documents such as the Columbus Comprehensive Plan, South Central Accord, Rocky Fork-Blacklick Accord, and Department of Public Utility documents such as municipal contracts and planned sewer extensions.

After the City work group created a proposed draft Facilities Plan Update, City representatives presented the draft, through a series of colloquies over a three month period, to regional stakeholders for consultation and comment.

REGIONAL SUPPORT FOR FACILITIES PLAN UPDATE

The City of Columbus consulted with the following regional sanitary sewer districts, municipal and township officials, county commissioners, and other stakeholders: [to be added]. As a result, the following entities have submitted endorsement letters for this Facilities Plan Update:

[to be added]

The following have submitted comment letters:

[to be added]

All referenced letters are submitted with this Plan.

STRATEGIES FOR WASTEWATER SERVICE

The proposed Facilities Plan Area boundary has been modified to reflect the City's desire to plan on a watershed basis. Within that boundary area, service shall be provided in the following manner.

! HOUSEHOLD SEWAGE DISPOSAL SYSTEMS

Individual sewage disposal systems that are properly installed and maintained are acceptable; if incorrectly installed or not operated nor maintained properly they present a threat to water quality within the proposed Facilities Plan Area. This is particularly true in the unincorporated areas of Franklin County because of the high concentration of hydric soils. Because these systems are outside of the jurisdiction of the Ohio EPA's permitting authority, the City recognizes that this document cannot dictate whether or not additional household sewage disposal systems, as that term is defined in O.A.C. § 3701-29-02, should be installed within the Facilities Planning Area. The City recognizes, however, the need for more comprehensive state rules and regulations, enhanced local enforcement of sanitary rules, adoption of better management regulations, and the continued education of system owners and operators. The City will be supportive of efforts by the local and state health departments to implement these environmental protection measures.

II. ALTERNATIVE WASTEWATER SYSTEMS

Alternative wastewater systems, such as those which treat and/or dispose effluent through spray irrigation or constructed wetlands, threaten drinking water, give rise to adverse environmental impacts (particularly in the Darby Watershed), result in detrimental fiscal impacts to local government, and deprive local government of control over community growth patterns. No alternative wastewater systems shall be installed or operated within the Facilities Plan Area Boundary.

III. CENTRALIZED WASTEWATER TREATMENT

A. City of Columbus Sewer System

With the exception of those areas particularly enumerated below in Sections B and C, all areas within the Facilities Plan Area Boundary shall be served by extending sanitary trunk sewers and branch sewers into the area. Wastewater collected from these areas shall be conveyed to either the Jackson Pike or Southerly Wastewater Treatment facilities for treatment and discharge.

Existing (developed) commercial, industrial, institutional and residential properties within the area, shall be required to connect to the City of Columbus sewer system when the system in extended to within 200 feet of the serviced structure. Such existing (developed) properties may continue to operate with existing sanitary facilities so long as those facilities are properly permitted for existing flows by the appropriate health department and/or the Ohio EPA. The flows to such existing sanitary facilities, however, may not be expanded nor increased.

B. City of Columbus Sewer System with Special Conditions

1. *Environmentally Sensitive Development Area (ESDA)*

This area is particularly sensitive to negative impacts from development because of the presence of Big Darby Creek (a State and National Scenic River) extensive hydric soils, and minimal slope. Of particular concern is the potential for wastewater and stormwater pollution that could come from haphazard growth. Creation of the Environmentally Sensitive Development Area (ESDA) is consistent with the 1993 Columbus Comprehensive Plan's provision for an Environmental Conservation District. Unplanned growth poses a threat to the Big Darby Creek.

While the City of Columbus will ultimately provide centralized service within it, no service whatsoever shall be provided within the ESDA until the City has determined that the following conditions are met for the area to be served:

- Riparian buffer restrictions;
- Comprehensive stormwater management planning;
- Conservation development restrictions are in place which involve the concept of clustering development to maintain tracts of open space; and
- Adequate public facilities, including roadways, exist or are planned to support any proposed development.

2. *Canal Winchester Area*

This area is currently served by centralized sewer operated by the Village of Canal Winchester. Wastewater collected in the Village of Canal Winchester shall be conveyed to Canal Winchester's existing publicly owned treatment works for treatment and discharge. Such service shall continue unless or until, Canal Winchester desires to

connect its system to the City of Columbus sewer system. Such connection shall occur in a manner that is mutually agreeable to the City of Columbus and the Village of Canal Winchester.

Existing (developed) commercial, industrial, institutional and residential properties within the area, shall be required to connect to the Village of Canal Winchester sewer system when the system in extended to within 200 feet of the serviced structure. Such existing (developed) properties may continue to operate with existing sanitary facilities so long as those facilities are properly permitted for existing flows by the appropriate health department and/or the Ohio EPA. The flows to such existing sanitary facilities, however, may not be expanded nor increased.

3. *Pickerington Area*

This area is currently served by centralized sewer operated by the City of Pickerington. Wastewater collected in the City of Pickerington shall be conveyed to Pickerington's existing publicly owned treatment works for treatment and discharge. Such service shall continue unless or until, Pickerington desires to connect its system to the City of Columbus sewer system. Such connection shall occur in a manner that is mutually agreeable to the City of Columbus and the City of Pickerington.

Existing (developed) commercial, industrial, institutional and residential properties within the area, shall be required to connect to the Pickerington sewer system when the system in extended to within 200 feet of the serviced structure. Such existing (developed) properties may continue to operate with existing sanitary facilities so long as those facilities are properly permitted for existing flows by the appropriate health department and/or the Ohio EPA. The flows to such existing sanitary facilities, however, may not be expanded nor increased.

4. *Jefferson Township Water and Sewer District Area*

This area is currently served by centralized sewer operated by the Jefferson Township Water and Sewer District. Wastewater collected in this area shall be conveyed to Jefferson Township Water and Sewer District's existing publicly owned treatment works for treatment and discharge. Such service shall continue unless or until, the sewer district desires to connect its system to the City of Columbus sewer system. Such connection shall occur in a manner that is mutually agreeable to the City of Columbus and the sewer district.

Existing (developed) commercial, industrial, institutional and residential properties within the area, shall be required to connect to the Jefferson Township Water and Sewer District sewer system when the system in extended to within 200 feet of the serviced structure. Such existing (developed) properties may continue to operate with existing sanitary facilities so long as those facilities are properly permitted for existing flows by the appropriate health department and/or the Ohio EPA. The flows to such existing sanitary facilities, however, may not be expanded nor increased.

5. *Citizens' Utilities*

There are two areas, Blacklick Estates and Huber Ridge, which are currently served by centralized sewer operated by a private utility, Citizens' Utilities. Such service shall

continue unless or until, the utility desires to connect its system to the City of Columbus sewer system. Such connection shall occur in a manner that is mutually agreeable to the City of Columbus and the utility.

6. *Fairfield County.*

This area is currently served by centralized sewer operated by the Fairfield County Water and Sewer District. Wastewater collected in Fairfield County shall be conveyed to Fairfield County Water and Sewer District's existing publicly owned treatment works for treatment and discharge. Such service shall continue unless or until, the sewer district desires to connect its system to the City of Columbus sewer system. Such connection shall occur in a manner that is mutually agreeable to the City of Columbus and the sewer district.

Existing (developed) commercial, industrial, institutional and residential properties within the area, shall be required to connect to the Fairfield County Water and Sewer District sewer system when the system in extended to within 200 feet of the serviced structure. Such existing (developed) properties may continue to operate with existing sanitary facilities so long as those facilities are properly permitted for existing flows by the appropriate health department and/or the Ohio EPA. The flows to such existing sanitary facilities, however, may not be expanded nor increased.

7. *Outside of Sewer Contract Areas.*

The City of Columbus has contracted to provide sewer service to Franklin County and the municipalities of Dublin, Hilliard, Upper Arlington, Marble Cliff, Grandview Heights, Valley View, Urbancrest, Grove City, Obetz, Lockbourne, Groveport, Brice, Reynoldsburg, Whitehall, Bexley, Gahanna, New Albany, Westerville, Minerva Park, Riverlea, and Worthington. Trunk and branch sewers will be first extended into areas within these contract areas and the City of Columbus.

In order to accommodate the development of modestly-sized commercial and institutional establishments prior to the extension of centralized sewer, an individual on-site wastewater treatment system or holding tank meeting the following conditions may be installed outside of these contract areas and the City of Columbus:

- The wastewater treatment system or holding tank shall be designed for flows no greater than 1500 gallons per day;

- The wastewater treatment system shall not generate an off-site discharge;

- A suitable area shall be available to provide for the complete relocation and replacement of the on-site sewage disposal system should the original system fail prior to public sewer becoming available.

- The wastewater treatment system shall not include an aeration system, unless the Ohio EPA permit to install authorizing the construction of the system includes, as a permit term or condition, a requirement that the owner of the system contract with a qualified service provider for maintenance on the system.

- The wastewater treatment system or holding tank shall be abandoned and demolished, at the owner's expense, within six months of the date upon which central sewers are extended to within 200 feet of the structure serviced by the system.

C. Madison County Area

Pursuant to the Madison County Ohio Farmland Preservation Plan adopted by the Madison County Commissioners on February 28, 2000, this area will not be developed at densities greater than 2 people per acre. It shall not be served by centralized sewer service.

CONCLUSION

This Facilities Plan Update meets the goals of protecting our water – drinking water and other critical water resources, particularly in the Darby Watershed, maximizing existing infrastructure investments, incorporating watershed planning into wastewater management, mitigating stormwater impacts from development, and curbing urban sprawl in a manner which is sensitive to the interests of the regional stakeholders. The City of Columbus requests that the Ohio EPA approve this Update and act to have it incorporated into the regional 208 Areawide Waste Treatment Management Plan.

The STATE ex rel. LIVINGSTON COURT APARTMENTS, Appellant,

v.

CITY OF COLUMBUS, Appellee.*

[Cite as *State ex rel. Livingston Court Apts. v. Columbus* (1998), 130 Ohio App.3d 730.]

Court of Appeals of Ohio,
Tenth District, Franklin County.

No. 98AP-158.

Decided Dec. 17, 1998.

Property owner filed complaint for writ of mandamus to compel city to commence an appropriation action. The Court of Common Pleas, Franklin County, adopted magistrate's decision denying the requested writ. Property owner appealed. The Court of Appeals, Deshler, P.J., held that: (1) city's inaction in failing to properly maintain and repair sewer system, resulting in flooding of property owner's basements, constituted taking, and (2) proper remedy for the taking was writ of mandamus compelling city to commence appropriation proceedings.

Reversed and remanded.

1. Eminent Domain ⇐2(10)

City's inaction in ignoring the effects of landowners' illegal connections of water drains to city's sewer system, which resulted in property owner's townhouse basements being flooded by raw sewage at times of heavy rainfall, constituted taking of property for which property owner was entitled to compensation. Const. Art. 1, § 19.

2. Eminent Domain ⇐2(1)

There does not need to be governmental "action," as opposed to "inaction," in order for there to be a taking; governmental inaction can result in a taking for which compensation must be paid. Const. Art. 1, § 19.

3. Mandamus ⇐3(4)

Writ of mandamus compelling city to commence statutory appropriation proceedings to compensate property owner for taking of its property, rather than a negligence action, was appropriate remedy for the taking, which resulted from city's failure to properly maintain and repair city's sewer system. Const. Art. 1, § 19.

4. Eminent Domain ⇐269

A property owner's remedy for an alleged taking of private property by a public authority is to bring a mandamus action to compel the authority to institute appropriation proceedings. Const. Art. 1, § 19.

Shuler, Plank, Morgan & Brahm and *James R. Leickly*, for appellant.

Janet E. Jackson, City Attorney, and *Christopher R. Yates*, Assistant City Attorney, for appellee.

DESHLER, Presiding Judge.

This is an appeal by relator, Livingston Court Apartments, from a judgment of the Franklin County Court of Common Pleas, overruling relator's objections and adopting a magistrate's decision denying relator's request for a writ of mandamus to compel respondent to commence an appropriation action.

Relator is the owner of the Livingston Court Apartments, located at 4101 East Livingston Avenue. On December 29, 1995, relator filed a complaint for a writ of mandamus against respondent, city of Columbus, asserting that the city had a duty to commence proceedings in the Franklin County Court of Common Pleas for the appropriation of relator's property pursuant to R.C. Chapter 163. It was alleged that the city had allowed the sanitary system under its control and operation to deteriorate and malfunction, causing raw sewage backup, on a regular basis, into the buildings of relator's property; the complaint further alleged that relator had demanded that the city correct the problem, but that the city had failed and refused to make repairs.

On October 3, 1996, the city filed a motion for summary judgment. Relator filed a cross-motion for summary judgment on October 21, 1996. On November 18, 1996, relator filed a motion for leave to amend its complaint for the purpose of adding a cause of action for negligence. By decision and entry filed January 15, 1997, the trial court denied both parties' motions for summary judgment, and further denied relator's motion for leave to amend its complaint.

The matter was referred to a magistrate, who conducted a bench trial beginning on August 11, 1997. The following findings of fact were set forth in the magistrate's decision, and while relator's objections challenged the magistrate's conclusions of law, neither party has objected to the findings of fact.

* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1999), 85 Ohio St.3d 1464, 709 N.E.2d 171.

Relator owns the Livingston Court Apartments, a group of three apartment buildings located at 4101 East Livingston Avenue, Columbus. Fifteen of the apartments are townhouses with basements.

An eight-inch sanitary sewer line, owned by the city, runs under the parking lot of the apartment complex. The eight-inch line is connected at the north end to another sanitary sewer line, also owned by the city. The eight-inch sewer line was constructed in the early 1970s by an entity other than the city. Prior to December 31, 1984, the city acquired the eight-inch line, and it has been a dedicated city sanitary sewer line since that time.

There are three lateral sanitary sewer lines, owned by the relator, which connect the city's eight-inch line to each of the three apartment buildings. The sanitary sewer system is primarily a gravity-driven system, designed to transport sewage, one-way only, to the city's waste treatment facility. There is also a twelve-inch storm sewer line in relator's parking lot, which runs parallel to the city's eight-inch sanitary sewer line.

When water falls on the roofs of the apartment buildings, it is collected by roof gutters. The gutters carry water to downspouts, which in turn carry water to catch basins in the parking lot and catch basins in the lawn on relator's property. There are three catch basins in the parking lot, connected by the twelve-inch storm sewer line. The city's sanitary sewer system and relator's storm sewer system are not connected; all of the storm and surface water on relator's property is transported to the storm sewer system, and all of the sewage from relator's property is transported to the sanitary sewer system.

The city is responsible for maintaining sanitary sewer lines and the storm sewer lines in Columbus. Pursuant to the Columbus City Code, it is illegal for a person to connect surface runoff water drains or ground water drains to the city's sanitary sewer system. However, property owners (other than relator) in the vicinity of the apartments have illegally connected their perimeter water drains to the city's sanitary sewer system. The city has had notice of the illegal connections since at least June 1980.

Relator purchased the apartments on December 31, 1984. During heavy rains, storm water from other properties in the vicinity has run into the city's sanitary sewer system as a result of the illegal connections. The presence of storm water in the sewer system increases the volume of fluid that the sewer system must transport; the increased volume exceeds the sewer system's capacity, causing fluid to flow in the wrong direction and flood relator's basements.

On at least eight separate occasions since relator purchased the apartments, raw sewage from the city's sanitary sewer lines has simultaneously flooded all fifteen of relator's townhouse basements. The flooding of relator's basements occurred on the following dates: November 10, 1985, July 22, 1989, July 12, 1990, July 13, 1992, August 5, 1995, May 8, 1996, May 31, 1997, and June 16, 1997. Each flooding incident was preceded by heavy rainfall in the vicinity of the apartments.

Relator complained to the city on each occasion that the basements flooded. The city has investigated the flooding but has always asserted that the city's sewer system is open and operating properly and that the flooding is caused by relator's three lateral sanitary sewer lines.

Contrary to the city's assertions, the magistrate found that the flooding of relator's basements is not caused by relator's lateral sewer lines; rather, the flooding is caused by heavy rains in conjunction with the illegal connections.

On the occasions when the basements have flooded, the depth of the sewage has measured from one to four feet in each of the basements, and the flooding has resulted in damage to the basements and their contents, including the tenant's personal property, the furnaces, the water heaters and sump pumps. Further, after each flooding, it takes relator two to three days to clean and disinfect all fifteen basements.

Because relator's tenants are not able to fully use the basements, relator has discounted the rent on the townhouses from approximately $525 per month to $405 per month. By virtue of the flooding, the value of the basements as well as the value of the apartments has been reduced. Relator has requested the city's permission to install a "flap gate" to prevent sewage from backing up into the city's eight-inch sewer line, but the city has refused permission.

On September 23, 1997, the magistrate rendered a decision denying relator's request for mandamus. In finding that relator was not entitled to relief in mandamus, the magistrate concluded that a taking had not occurred because the flooding at issue was the result of the city's inaction as opposed to a governmental act. The magistrate further concluded that, even assuming a taking had occurred, relator possessed a plain and adequate remedy in the ordinary course of law by way of an action in negligence.

On October 7, 1997, relator filed objections to the magistrate's decision. By decision filed December 19, 1997, the trial court denied relator's objections and adopted the decision of the magistrate. The trial court agreed with the magistrate's determination that a taking had not occurred, holding in part that "the City did not engage in an affirmative act of taking, but instead its inaction caused the harm complained of." The trial court further agreed with the magistrate's conclusion that relator had an adequate remedy in the ordinary course of law through a negligence action. The decision of the trial court was journalized by judgment entry filed January 13, 1998.

On appeal, relator sets forth the following four assignments of error for review:

"Assignment of Error No. 1

"Based upon the undisputed factual findings that the City of Columbus operates a sanitary sewer system which causes raw sewage to flood the owner's basements and restrict the owner's use of them, the trial court erred in that it should have concluded that the owner is entitled to a writ of mandamus compelling the City to initiate appropriation proceedings because the City has taken the owner's property and must compensate the owner for it.

"Assignment of Error No. 2

"The trial court erred in basing its denial of a writ of mandamus on the finding that the City of Columbus did not actively take owner's property. Whether the City of Columbus's operation of a sanitary sewer system which floods an owner's basement with raw sewage can be described as an action or an inaction is irrelevant to the inquiry of whether such flooding constitutes a taking of private property.

"Assignment of Error No. 3

"The trial court erred in its denial of a writ of mandamus because it believed the owner had an available remedy by filing a negligence action. When a city takes private property without compensating the owner or bringing an appropriation action against the owner, a writ of mandamus is the proper remedy and a negligence action is not a plain and adequate remedy available in the ordinary course of the law.

"Assignment of Error No. 4

"The trial court erred in failing to grant the owner leave to amend its complaint to add a negligence claim because the owner timely filed its motion for leave in good faith and because allowing the amendment would not have unduly prejudiced the City or unduly delayed the proceedings."

[1] Relator's first, second, and third assignments of error are interrelated and will be addressed together. The primary issue raised by relator is whether the trial court erred in failing to grant relief in mandamus based on the court's determination that a taking had not occurred.

Section 19, Article I of the Ohio Constitution provides:

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

In *Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102, paragraph one of the syllabus, the Ohio Supreme Court held that "[a]ny direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the property owner over it, is a taking of his property, for which he is guaranteed a right of compensation by Section 19 of the Bill of Rights." See, also, *Summit Cty. Bd. of Commrs. v. Alderman* (Mar. 4, 1981), Summit App. No. 9826, unreported, at 3–4, 1981 WL 3888 (any act on the part of appropriating authority "which amounts to a substantial interference with the owner's property and which lessens or destroys the value of that property or which abridges the owner's right to the enjoyment of the property can be properly designated as a taking of that property").

As noted, the magistrate determined, based on the evidence presented, that "[c]ontrary to the City's assertions, the flooding of Relator's basements is not caused by Relator's lateral sanitary sewer lines." Rather, the magistrate found, the flooding is caused by heavy rains in conjunction with illegal connections by property owners of their perimeter water drains to the city's sanitary sewer system. The magistrate further noted that the city had been put on notice of these illegal connections since at least June 1980. Thus, the magistrate concluded, "Despite notice of the illegal connections described above, the City did not exercise reasonable diligence and care to keep the sanitary sewer free of the storm water which entered the sanitary sewer from those illegal connections."

[2] Despite the above findings, the magistrate further found that a taking had not occurred because the cause of the flooding was the city's inaction. The trial court agreed with the reasoning of the magistrate that there must be a governmental action, as opposed to inaction, in order for there to be a taking. In support, both the magistrate and trial court relied on a federal Court of Claims decision, *Barnes v. United States* (1976), 210 Ct.Cl. 467, 538 F.2d 865.

Relator argues that the magistrate and trial court erred in attempting to draw a distinction between governmental action and inaction, and that this distinction is without support under Ohio law. We agree.

A long line of Ohio Supreme Court cases holds that a taking may result where sewage or storm water from a governmental authority causes damage to a property owner. See *Masley v. Lorain* (1976), 48 Ohio St.2d 334, 2 O.O.3d 463, 358 N.E.2d 596, syllabus ("[t]he construction and operation of a municipal storm sewer system so as to cause material damage to a downstream landowner, as a result of flooding from rains or other causes which are reasonably foreseeable, is

a direct encroachment upon that land which subjects it to a public use that excludes or restricts the landowner's dominion and control over his land, and such owner has a right to compensation for the property taken under Section 19, Article I of the Ohio Constitution"); *Lucas v. Carney* (1958), 167 Ohio St. 416, 5 O.O.2d 63, 149 N.E.2d 238, syllabus (flow of surface water from county's land that deposited debris on land of private property owners and deprived owners of use and enjoyment of property constituted taking "for which county is liable, and the owner of such property is entitled to institute an action and have a jury empaneled to determine the compensation due him from the county for the appropriation *pro tanto* of his property"); *Norwood, supra* (sewer constructed by private parties, but subsequently taken over and controlled and maintained by city, which caused flooding and pollution on land stated a cause of action for temporary appropriation of private property to a public use); *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 63 N.E. 86, paragraph three of the syllabus ("[w]here a municipal corporation, without a legal appropriation in which the riparian owner is afforded an opportunity to obtain compensation, causes its sewage to be emptied into a natural watercourse, thereby creating a nuisance inflicting special and substantial damages on such proprietor, it is liable to an action for the damages so sustained").

The city argues that this case is distinguishable from other actions involving a taking of private property because the instant case does not involve a public improvement; rather, the sanitary system "is a preexisting system that has been in place for a long time." The city further contends that it did not engage in any affirmative act, nor did it provide any authorization.

We find little significance to the city's claim that the sewer system was preexisting and in place for a long time. The findings of fact by the magistrate do not indicate that the flooding was caused due to the original design of the system ("there have been no defects or malfunctions in the City's eight-inch sanitary sewer line"). Rather, the flooding resulted from "heavy rains in conjunction with the illegal connections" made by other property owners. Further, while the sewer line was constructed by someone "other than the City," the magistrate noted that prior to December 31, 1984, the city "acquired the eight-inch line, and it has been a dedicated City sanitary sewer line since that time."

As noted above, the city argues that Ohio cases involving a taking require an affirmative act on the part of the governmental authority. In particular, the city contends that the holding in *Masley, supra*, and its interpretation of the holding of other cases cited therein, "clearly contemplates the necessity of government action when there is a taking."

Relator argues that the city misreads *Masley* and that the facts of that case actually involve the imposition of liability for the failure to act. We agree with

relator's analysis of that case. In *November Properties v. Mayfield Hts.* (Dec. 6, 1979), Cuyahoga App. No. 39626, unreported, the court discussed the holding in *Masley*, as well as the holding in *Myotte v. Mayfield* (1977), 54 Ohio App.2d 97, 8 O.O.3d 202, 375 N.E.2d 816, in considering whether a city's failure to act can give rise to liability. In *November Properties*, the court first noted the factual background of the *Masley* decision:

"In *Masley* the City of Lorain wished to install a storm sewer system. * * *

"The City of Lorain hired an engineer who made a report recommending the enclosure of the storm sewers as well as the improvement of Martin Run Creek by widening, deepening and straightening it. The city proceeded with the implementation of the storm sewer system, and did actually install the enclosed tributary storm sewers, but did not improve Martin Run Creek.

"As a result of the increased and accelerated flow of water after storms and rains, Martin Run Creek overflowed and the water ponded on the Masley property until it gradually subsided and flowed into Lake Erie. The Masleys filed an action against the City of Lorain on alternative theories of damage and unconstitutional appropriation of property in violation of Art. I, Sec. 19 of the Ohio Constitution.

"The trial court found that the Masleys did not have a cause of action either for damages or for appropriation. The Court of Appeals reversed that judgment, holding that there was no damage based on the traditional riparian law theory, but that the Masleys had stated a cause of action for appropriation since their property was effectively taken over and not able to be used by the Masleys.

"The Ohio Supreme Court affirmed the decision of the Court of Appeals, finding an appropriation of the Masleys' property, for which compensation must be paid." *Id.* at 23-25.

The court in *November Properties* then analyzed the basis of the Ohio Supreme Court's holding in *Masley*:

"The principal holding of *Masley* is that where a municipality constructs or fails to maintain a public improvement such as a storm sewer system and thereby effectively takes private property in that municipality for its own use by casting surface waters upon that property, it must pay compensation for the property taken under Art. I, Sec. 19 of the Ohio Constitution.

"A review of the record in *Masley* clearly demonstrates that the real basis of the decision was that, because the city had not widened, deepened or straightened Martin Run Creek, as recommended by the engineer, the flooding that occurred constituted an appropriation of the Masleys' property, for which the city was liable. * * * Because the city had been forewarned, but *failed to act* in the

required manner, and because the flooding effectively appropriated the Masley property, the city was liable.

" * * * *

"In * * * *Masley* * * * the liability did not attach to the city solely on the basis of the action taken by the city. On the contrary, liability attached on the basis that the city did not install a complete and adequate system. It was the city's failure to provide an adequate system that made it liable. * * * It was the city's failure to improve Martin Run Creek which substantially contributed to the taking of the Masley property.

"In *Myotte*, the city approved plans for storm sewers for the industrial park immediately upstream of the Myotte property. The city recognized that there would be an increase and acceleration of the flow of the storm water because of the development of the industrial park. It was also aware that the natural watercourse in front of the Myotte house was four feet by six feet which narrowed to and was restricted to 27 inches due to the construction of a culvert by Mrs. Myotte in front of her home. It was the city's failure to remove the culvert and widen and deepen the channel, if necessary, that led to its liability.

"Therefore, the lesson of *Masley* and *Myotte* is that liability will attach to a municipality by its *refusal* to take action as much as by its improper action." (Emphasis added.) *Id.* at 25–28.

The court in *November Properties* went on to hold that "[w]here a municipality maintains an inadequate sewer system which causes flooding and an effective appropriation of property or major damage, liability will attach * * * whether the municipality acts affirmatively and deliberately or whether it fails to act." *Id.* at 31. The court reasoned that "the municipality's affirmative act or its failure to act produces the same result, that being damage and liability." *Id.*

We find that Ohio law, as noted by the *November Properties* court's analysis of *Masley*, does not support the trial court's attempt to distinguish between an affirmative act by a governmental entity as opposed to a failure to act. Further, we agree with relator's contention that the federal Court of Claims decision in *Barnes*, relied on by the trial court, does not stand for the proposition that only affirmative acts can cause a taking. As noted by the relator, the distinction between affirmative governmental acts and the failure to act was not even at issue in that case. Rather, at issue in *Barnes* was whether flooding problems experienced by the plaintiffs were the "natural consequence of the Government's control of the flow of a river through dams." *Id.*, 538 F.2d at 865.

In the present case, the facts indicate that the flooding of relator's property is the result of heavy rain in conjunction with illegal storm water connections to the city's sewer system by other property owners. The city's contention that there

has been "no authorization" is unpersuasive. The right to repair and control the storm and sewer system is vested with the city. See *November Properties, supra*, at 20 ("maintenance of local storm and sanitary sewers is the responsibility of a municipality"), citing *Ball v. Reynoldsburg* (1963), 175 Ohio St. 128, 23 O.O.2d 413, 192 N.E.2d 51; *Barberton v. Miksch* (1934), 128 Ohio St. 169, 190 N.E. 387; *Portsmouth v. Mitchell Mfg. Co.* (1925), 113 Ohio St. 250, 148 N.E. 846; *Canton v. Shock* (1902), 66 Ohio St. 19, 63 N.E. 600. The fact that there is a city ordinance [1] forbidding such connections is of little consequence to relator where the evidence is undisputed that the city, despite knowledge of the illegal connections, made no effort to enforce its provisions. We fail to see how the city's decision (whether viewed as an act or omission) to ignore the effects of the illegal connections relieved it of its duty to maintain and operate the sewer system, especially where the right to control and repair the sewer rests solely with the city. See *Hines v. Nevada* (1911), 150 Iowa 620, 130 N.W. 181, 184 (fact that individual lot owners made connections with sewer system in violation of ordinance would not relieve city of duty to prevent sewer from becoming a nuisance; the duty of maintenance, repair and preventing it from becoming source of discomfort could not be avoided by delegating it or shifting it to the shoulders of the lot owners). Further, the evidence, as noted by the magistrate, indicates that "[t]he flooding of Relator's basements is an inevitable, recurring and inundating condition. The flooding will recur with heavy rainfall."

Under these circumstances, we find that the sewer system at issue, maintained and controlled by the city, was used by the city in a manner causing damage to relator from flooding by raw sewage, and that this interference with the landowner's use and enjoyment of the property constituted a taking. See *Masley, supra*; *November Properties, supra*, at 25 (where a municipality "fails to maintain a * * * sewer system and thereby effectively takes private property in that municipality for its own use by casting surface waters upon that property, it must pay compensation for the property taken under Art. I, Sec. 19 of the Ohio Constitution").

[3, 4] The trial court further held, based on its determination that no taking occurred, that relator's proper remedy sounded in tort, *i.e.*, an action based on negligence. However, "[i]t is well settled in Ohio that a property owner's remedy for an alleged 'taking' of private property by a public authority is to bring a

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1. Columbus City Code 1145.23 states:

"Except as otherwise provided by this chapter, no person shall connect roof, foundation, area way, parking lot, roadway, or other surface runoff or ground water drains to any sanitary sewer which is connected to the city's POTW treatment facility. Any such connections shall be considered illegal, and shall be subject to immediate removal by the owner of the premises so connected, and at such owner's expense."

mandamus action to compel the authority to institute appropriation proceedings." *Consol. Rail Corp. v. Gahanna* (May 16, 1996), Franklin App. No. 95APE12-1578, unreported, at 8, 1996 WL 257457 (noting that "[i]nverse condemnation and similar direct actions to obtain compensation for a 'taking' of private property are not recognized in Ohio"). See, also, *Probst v. Summit Cty.* (Mar. 26, 1997), Summit App. No. 17810, unreported, at 9, 1997 WL 148614 ("[b]ecause Ohio does not recognize a direct 'inverse condemnation' action to obtain compensation for the taking of private property, a property owner's remedy for an alleged taking is an action in mandamus to compel the public authority to institute appropriation proceedings"); *Keyport Land Co. v. Toledo* (Dec. 10, 1993), Lucas App. No. L-92-285, unreported, at 4, 1993 WL 513197 ("[i]n cases concerning claims of appropriation without compensation, mandamus is the proper procedure"); *Florian v. Paul* (June 8, 1977), Hamilton App. No. C-76332, unreported, at 4 ("[t]he Supreme Court of Ohio has determined that where a taking is made by the state, or any subdivision thereof, the property owner's proper avenue of redress is an action for mandamus to compel the appropriating authority to formally appropriate the property in question").

In *Florian*, the plaintiff brought an action for compensation against a board of county commissioners, alleging that plaintiff was the owner of certain real property and that substantial quantities of raw sewage had been permitted by defendants to flow from sewer lines onto plaintiff's property. Plaintiff alleged that the actions of defendants constituted a partial and temporary taking of his property without compensation. The defendants moved to dismiss plaintiff's complaint, alleging that plaintiff's complaint stated a cause of action for negligence instead. The trial court agreed and dismissed the complaint.

On appeal, the court in *Florian* reversed, stating:

"We believe that the trial court in the instant case was under a[n] * * * obligation to permit the plaintiff to prove his entitlement to * * * [a] broad range of relief. The plaintiff's claim for compensation was based not upon some inapt theory of negligence, but upon an alleged appropriation of his property by the defendant Commissioners for a public use. Moreover, the factual allegations of the instant complaint, which stand admitted as true for purposes of the motion to dismiss, set forth every element necessary to establish the existence of a compensable *pro tanto* appropriation, to wit: that plaintiff had suffered a direct, if temporary and partial, encroachment upon his property which subjected it to a public use and which excluded or restricted his dominion and control over such property. See *Masley v. Lorain* (1976), 48 Ohio St.2d 334 [2 O.O.3d 463, 358 N.E.2d 596]; *Lucas v. Carney* (1958), 167 Ohio St. 416 [5 O.O.2d 63, 149 N.E.2d 238]; *Norwood v. Sheen* (1933), 126 Ohio St. 482 [186 N.E. 102].

"The plaintiff thus properly alleged a claim for a *pro tanto* appropriation of his property by the defendant Commissioners, and was entitled to proceed to trial in order to obtain all appropriate relief therefor. The Supreme Court of Ohio has determined that where a taking is made by the state, or any subdivision thereof, the property owner's proper avenue of redress is an action for mandamus to compel the appropriating authority to formally appropriate the property in question. *Wilson v. City of Cincinnati* (1961), 172 Ohio St. 303 [16 O.O.2d 71, 175 N.E.2d 725]." *Id.* at 3-4.

Similar to the facts of *Florian*, in the instant case relator's complaint did not seek damages based on alleged negligence by the city. Rather, the complaint alleged that "[t]he presence of raw sewage on Relator's property has resulted in a temporary and/or permanent and substantial interference [with] the Relator's use and enjoyment of its property amounting to a taking."

Based upon the foregoing, we find that the trial court erred in its legal determinations that only an affirmative act constitutes a taking and that relator had an adequate remedy at law by means of a negligence action. Where the evidence at trial established that the cause of the flooding was heavy rains in conjunction with the illegal connections, resulting in the flow of sewage onto relator's property, we conclude that relator is entitled to a writ of mandamus ordering the city to commence statutory appropriation proceedings to compensate relator for the taking of its property. Thus, relator's first, second, and third assignments of error are sustained.

In light of our disposition of the above assignments of error, the issue raised under relator's fourth assignment of error, regarding the trial court's denial of relator's motion for leave to amend its complaint, is rendered moot.

Accordingly, relator's first, second, and third assignments of error are sustained, relator's fourth assignment of error is rendered moot, the judgment of the trial court is reversed, and this matter is remanded to the trial court for further proceedings in accordance with law and consistent with this opinion.

Judgment reversed and cause remanded.

BOWMAN and MASON, JJ., concur.